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Berman-Coble Goes Too Far

Legalizing hacking of P2P networks hurts start-ups, not thieves

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Longtime congressional veterans Howard Berman (D-Hollywood) and Howard Coble (R-North Carolina) recently coughed up an incredibly vivid example of how easily government officials can unintentionally screw up the economy. The authors of economic textbooks will, no doubt, be in debt to this pair for decades. But the Howards are sure to be decidedly less popular with the tens of thousands of high-tech workers who won't have jobs, thanks to the dubious achievement of these politicians.

This case study came in the form of a bill the legislators drafted earlier this summer, back when it looked as if the high-tech economy might finally be climbing to its knees. The legislation, HR 5211 (known formally as the Peer to Peer Piracy Prevention Act), would make it legal for copyright owners to sabotage peer-to-peer (P2P) file-trading networks if they think their rights are being infringed. The proposal does not specify what type of sabotage would be permitted, but the early guessing among experts is that it would include intentionally mislabeling files (called "spoofing"), flooding servers with so many requests that they crash (called a "denial of service" attack) or circulating viruses that disrupt file trading. The bill's authors say the move is necessary to prevent or at least impede further pirating of songs, movies and other copyrighted digital goods over the Internet.

If the measure passes, record companies and other entertainment conglomerates would not have to worry about reimbursing innocent victims for the full costs of any destruction they might cause. All they would need to avoid liability for their actions is what the Howards call "a reasonable basis" for suspecting their copyrighted works are being traded without permission.

Fortunately, the bill's immediate chances of passage appear slim, according to several congressional sources. Longer-term, however, efforts to achieve the same goal could gain momentum, thanks to expected financial backing from the entertainment industry. Early opponents include Silicon Valley's entire congressional delegation, which consists of Anna Eshoo (D-Atherton), Mike Honda (D-San Jose) and Zoe Lofgren (D-San Jose).

Unfortunately, the damage has already been done.

Even if it doesn't pass, just introducing the bill has hammered another nail into the coffin that contains hundreds of once-promising P2P business plans. As a consequence, most Silicon Valley venture capitalists won't touch those business plans with a 10-foot term sheet. Would you invest in a company if it were possible that others might soon be able to legally damage it without recourse?

It's as if someone had proposed a law in 1965 to make it legal for anyone to burst into offices and burn IBM punch cards because their use was putting stenographers out of business. You can imagine the wonders that would have done for the economy. Unfortunately, regardless of how silly it may sound, the Berman-Coble proposal is being taken seriously, particularly by skittish venture capitalists who've seen Congress pass bad laws before (free stock options, anyone?) when enough money got behind them.

What makes this turn of events particularly unfortunate is that many experts believe advanced P2P applications will lead to the next really big wave in computing. And that would lead to a fresh round of badly needed high-tech consumption in areas ranging from computer servers to routers to high-speed telecom equipment. So it's not just startup entrepreneurs who are getting hurt because government officials are discouraging fresh P2P investments. It's also hurting many other suppliers that would have been enriched by those growing firms.

The Berman-Coble proposal's utter unworkability makes its introduction even more outrageous. Put simply, record companies will never be able to hire enough programmers to outcode the hackers who are always eager to participate in just the type of digital warfare the Howards have proposed to unleash. The only real question is how many innocent parties will be caught in the crossfire as computer users suddenly lose files, the reliability of their networks or the stability of their computers.

For his part, Berman claims to be "a strong believer" in the beneficial potential of P2P networks as long as they don't infringe on the rights of others. In a statement released along with his bill, Berman also said that he really doesn't want to see anyone damage the files or equipment of P2P networks or their users.

But opponents point to his measure's fine print, which promises to do exactly that. The bill offers no protection to legitimate P2P operations. Instead, according to its text, legal sabotage of P2P networks would be prohibited only if a "§ copyright owner impairs the trading of files that don't contain his/her copyrighted work, unless such impairment is necessary to impair the trading of his/her copyrighted work."

In other words, copyright owners can't interfere with the transmission of materials they don't own unless they think they have to, in which case they can. All they need is that "reasonable belief" we mentioned earlier. Some protection.

"It resembles a form of vigilante justice without regard for due process or the potential impact on innocent and legal users of content," Eshoo said in a statement released to SF Gate this week. "Draconian legislation like this also has serious funding impacts on companies trying to offer legitimate peer-to-peer networking approaches for distributing content."

And just what are those new businesses?

It's hard to say right now, because most startup next-generation P2P business plans were just beginning to take shape before they had the funding rug pulled out from under them.

But, just for starters, think businesses that are organized like clubs.

Clublike P2P businesses could one day find better ways to link people with common interests, whether it's stock trading, cooking, horse racing, photography or writing. Under this model, users would pay membership fees to access whatever file-swapping networks serve them best by offering the information, work products or expert advice they need. Architects could agree to share blueprints and graphic artists might swap logos, while writers could borrow sources from one another by riffling through the equivalent of a communal Rolodex.

But none of that is going to happen anytime soon, thanks to Mssrs. Berman and Coble. Ditto with the related new sales of hardware and software those activities would have created.

Venture capitalists see Berman's involvement in the proposed legislation as particularly chilling to new investments in the sector because, as a ranking Democrat, he is expected to become considerably more influential in the next Congress should his party regain control, as some leading pundits expect.

That's why it is not enough that Berman has drawn fire from Silicon Valley's defenders in Congress. Something more dramatic has to happen before the investment community will start writing checks to P2P startups again.

Just imagine, for a moment, if someone had introduced legislation that did similar damage to Detroit's auto industry or Wall Street's financial sector. It's a virtual certainty that the legislators responsible would be forced to pay some type of a price. One would expect members of Congress from the affected areas to use every trick in the book, including threats of reprisals, to push the offending idea off the legislative agenda.

In this case, getting Berman to withdraw his name from the proposal would be a good place to start. Members of Congress often remove their names from bills under the heat of public pressure or in the interests of crafting a compromise. If Silicon Valley's congressional delegation can convince Berman to back off, it would signal the return of a measure of safety for P2P startups that would help revive investor interest in the flagging sector. At a minimum, entrepreneurs could start dusting off their business plans.

That's why the time has come for Silicon Valley's enlightened congressional delegation to put some real heat on their job-killing colleague from Hollywood. There must be some other front that could be opened in this fight that would help him gain a deeper appreciation of the damage his actions are causing to everyone other than his campaign contributors.

Come to think of it, if Democrats Eshoo, Honda and Lofgren were to join forces with the House's near majority of anti-Hollywood Republicans, it's possible they could cause so much damage to Tinseltown's interests that the studios would be making disaster movies about it. At the very least, a coordinated legislative counterattack would make Berman and his colleagues think twice before they hastily push more people out of work.

In short, local legislators must do more than just oppose the bill; they need to convince the investment community that the idea is truly dead.

And that will take more than a couple of well-worded press releases.



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